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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/534,734

05/12/2005

Keitaro Matsumoto

Q87786

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23373 7590 02/26/2010  
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EXAMINER

MERCIER, MELISSA S

ART UNIT

PAPER NUMBER

1615

NOTIFICATION DATE

DELIVERY MODE

02/26/2010

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

sughrue@sughrue.com  
PPROCESSING@SUGHRUE.COM  
USPTO@SUGHRUE.COM

<b>Office Action Summary</b>	<b>Application No.</b> 10/534,734	<b>Applicant(s)</b> MATSUMOTO ET AL.	
	<b>Examiner</b> MELISSA S. MERCIER	<b>Art Unit</b> 1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 02 November 2009.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-8 is/are pending in the application.
- 4a) Of the above claim(s) 6-8 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948)                        | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Summary***

Receipt of Applicants Remarks and Amended Claims filed on November 2, 2009 is acknowledged. Claims 1-8 remain pending in this application. Claims 5-8 remain withdrawn from consideration. Claims 1-5 remain under prosecution in this application.

### ***Withdrawn Rejections/Objections***

#### ***Claim Rejections - 35 USC § 102***

The rejection of claims 1-5 under 35 U.S.C. 102(b) as being anticipated by Emota et al. (WO99/34690) abstract, of record, evidenced by EP 1 046 347 A1, English equivalent has been withdrawn in view of Applicants arguments regarding a lack of specificity to be anticipatory.

### ***Maintained Rejections/Objections***

#### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-5 rejected under 35 U.S.C. 102(b) as being anticipated by Takaichi et al. (WO91/15127), abstract of record, evidenced by EP 0 478 792 A1, English equivalent.

Takaiohi discloses a high protein, high viscosity alimentary food comprising on a dry weight basis 40-65% protein, 5-25% fat, and 15-40% carbohydrates (abstract). Applicant's attention is directed to page 3, which discloses preferred ranges of 40-53% protein, 1-18% fat, and 20-35% carbohydrates.

The recitation of wherein the injury is a fracture, joint injury, pulled muscle, or sprain is regarded as future intended use of the composition and therefore not given patentable weight. However, since the same composition is disclosed by Takaiohi, it would inherently also possess the same functional limitations.

### ***Response to Arguments***

Applicant's arguments have been fully considered but they are not persuasive. Applicant argues:

**\*the ranges discloses by Takaiohi do not disclose the claimed amounts with sufficient specificity.**

The Examiner respectfully disagrees. While Takaiohi's ranges are slightly larger than the claimed ranges, the preferred embodiments and ranges are disclosed with sufficiently specificity to immediately envision the instant claims.

Claims 1-5 are rejected under 35 U.S.C. 102(b) as being anticipated by Shimizu et al. (WO97/43912), abstract of record, evidenced by US Patent 6,004,926, English equivalent.

Shimizu discloses a food composition comprising 10-65% protein, 5-25% fat, and 15-70% carbohydrates, on a dry weight basis (abstract). Preferred amounts disclosed are: 40-65% protein, 2-25% fat, and 15-40% carbohydrates (column 3, lines 1-10).

The recitation of wherein the injury is a fracture, joint injury, pulled muscle, or sprain is regarded as future intended use of the composition and therefore not given patentable weight. However, since the same composition is disclosed by Shimizu, it would inherently also possess the same functional limitations.

### ***Response to Arguments***

Applicant's arguments have been fully considered but they are not persuasive.

Applicant argues:

**\*the ranges discloses by Shimizu do not disclose the claimed amounts with sufficient specificity.**

The Examiner respectfully disagrees. While Shimizu's ranges are slightly larger than the claimed ranges, the preferred embodiments and ranges are disclosed within the claimed ranges, thereby anticipating the instant claims.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not

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mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MELISSA S. MERCIER whose telephone number is (571)272-9039. The examiner can normally be reached on 8:00am-4:30pm Mon through Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robert A. Wax can be reached on (571) 272-0623. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Melissa S Mercier/

/Carlos A. Azpuru/

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Examiner, Art Unit 1615

Primary Examiner, Art Unit 1615